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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DIAMONTE JEROME MCGHEE et al., Defendants and Appellants.	B265136 (Los Angeles County Super. Ct. No. PA071844)

APPEAL from judgments of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed, and remanded with directions.

H. Russell Halpern for Defendant and Appellant Diamonte Jerome McGhee.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant Eric Michael Edwards.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E.

Winters, Assistant Attorney General, Shawn McGahey Webb, Idan Ivri, and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Diamonte Jerome McGhee and Eric Michael Edwards appealed the judgment following their convictions for numerous counts, including murder, attempted murder, assault with a semiautomatic firearm, and robbery, along with enhancements and special circumstances. They raised an array of alleged errors, none of which we found warranted reversal in our opinion affirming the judgment, filed March 16, 2017.

Defendant Edwards petitioned our Supreme Court for review. On April 10, 2019, the Supreme Court transferred the matter back to our court with directions to vacate our decision and reconsider the cause in light of Senate Bill No. 1437 (2017-2018 Reg. Sess.), which changed the law on what mental state is required to be guilty of murder. (Stats. 2018, ch. 1015.) Defendant Edwards and respondent filed supplemental briefing. Edwards contends we must reverse the judgment of conviction of murder and attempted murder for retrial. Respondent contends Edwards cannot avail himself of the benefits of Senate Bill No. 1437 on direct appeal and the statute does not apply to attempted murder. We agree with respondent.

"On September 30, 2018, while [the] defendant's appeal was pending, the Governor signed Senate Bill No. 1437. The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal

Code sections 188 and 189,[1] as well as by adding . . . section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2-4.)" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*), review denied May 1, 2019, S254288.)

Martinez held defendants must seek retroactive relief under Senate Bill No. 1437 by way of the statutorily specified procedure, which requires that defendants file a petition with the sentencing court as provided in section 1170.95. The court in *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153 followed *Martinez*. Except for our agreement with these courts' careful and correct analysis, we have nothing to add.

We grant respondent's request to take judicial notice of the minute order of the sentencing court reflecting that Edwards filed a petition for resentencing pursuant to section 1170.95 while this appeal was pending, which the trial court declined to rule on given the pendency of this appeal. On remand, Edwards may renew his petition before the sentencing court.

Edwards contends Senate Bill No. 1437 allows him to seek vacatur of his conviction of attempted murder. We find Senate Bill No. 1437 does not apply to a conviction of attempted murder. By its plain terms, it applies only to felony murder or murder under a natural and probably consequences theory. Neither the sections added nor amended by Senate Bill No. 1437 make any reference to *attempted murder*. (§§ 188, 189, 1170.95, subds. (a),

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1 All undesignated statutory citations are to the Penal Code unless otherwise noted.

(d).) "If the plain language of the statute is clear and unambiguous, [the courts'] inquiry ends, and [one] need not embark on judicial construction." (*People v. Johnson* (2002) 28 Cal.4th 240, 244.)

Since the Supreme Court vacated our entire opinion, we address below all the issues raised in defendants' appeals, including those that implicate the felony-murder rule and the natural and probable consequences doctrine as the law existed at the time of trial.

PROCEDURAL BACKGROUND

McGhee, Edwards, and a third defendant, Branden Trevaughn Higgs (collectively defendants), were charged with numerous offenses following two separate incidents. For a confrontation that occurred on October 29, 2011, McGhee and Edwards were charged with the attempted premeditated murder and assault with a semiautomatic firearm of Nikolas Gordian (Pen. Code, §§ 187, subd. (a), 664 [count 6], 245 [count 16]), and five separate counts of assault with a semiautomatic firearm involving five other victims (§ 245 [counts 7-11]).

For a robbery and shooting that occurred on October 31, 2011, all three defendants were charged with the murder of Alejandro Sanchez-Torrez (§ 187, subd. (a)) with a special circumstance allegation that the murder occurred while engaged in the commission of a robbery (§ 190.2, subd. (a)(17) [count 1]); four counts of attempted premeditated murder of Rick Sandoval (§§ 187, subd. (a), 664 [counts 2, 3, 12, 17]); four counts of assault with a semiautomatic firearm of Sandoval (§ 245, subd. (b) [counts 13, 14, 15, 18]); conspiracy to commit robbery (§ 182, subd. (a)(1) [count 4]); and second degree robbery of Sandoval (§ 211 [count 5]).

Various firearm allegations were alleged. (§§ 12022, subd. (a)(1), 12022.5, 12022.7, subd. (a), 12022.53, subds. (b)-(d).) It was further alleged McGhee had two prior serious felony juvenile adjudications. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

Defendants were tried jointly before the same jury, which issued mixed verdicts. For the counts related to the October 31, 2011 shooting, the jury acquitted both McGhee and Edwards of conspiracy but found them guilty on all other counts, found the special circumstance attached to the first degree murder count to be true, and found all the firearm allegations true. For the October 29, 2011 incident, the jury acquitted Edwards on all counts. It convicted McGhee of the assault on Gordian, deadlocked on the attempted murder count involving Gordian, and acquitted him of all the assault counts.

The jury acquitted Higgs on the conspiracy count and deadlocked on all remaining counts for both incidents.

The court found McGhee's prior conviction allegations true and sentenced him to life without parole plus 209 years to life. It sentenced Edwards to 58 years to life. They separately appealed.

FACTUAL BACKGROUND

1. Facts Prior to the October 29, 2011 Incident

At the end of October 2011, McGhee, Edwards, Higgs, and Keyada Robinson were staying at Michelle Hudson's home in Santa Clarita.[2] At the time, all three defendants were 17 years old, and Robinson was 16 years old. Higgs and Edwards were cousins, but McGhee "really didn't know" Edwards. On

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[2] For convenience, we will use first names of individuals who share surnames with others.

October 28, 2011, McGhee showed Michelle's son Skyler a gun while Edwards and Higgs were present.

2. October 29, 2011 Incident

On Friday night, October 28, 2011, Gordian went to a party in Canyon Country and had an altercation with McGhee at the entrance. The next day—Saturday, October 29, 2011—McGhee and Gordian arranged to meet under a bridge to fight. Gordian, his brother, and five friends went to the location, and McGhee arrived with Edwards.[3] McGhee and Gordian got into a confrontation, and McGhee displayed a black .32- or .38-caliber semiautomatic handgun. McGhee fired one shot at Gordian, which hit the ground near him. Gordian's group ran.[4] McGhee and Edwards returned to the Hudson home. McGhee yelled at Higgs and Robinson for leaving them that day and complained that "someone he barely knew had his back when he had to do something," referring to Edwards.

3. Discussions of Committing Robbery

According to an interview with police, Robinson said McGhee, Higgs, and Edwards told him on Saturday, October 29, 2011, they wanted to "hit a lick," that is, commit a robbery. McGhee brought up the subject, and Edwards and Higgs discussed it, but not as much as McGhee did. Edwards was "always the quiet one"; he would "always be the one that will be,

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[3] The people in Gordian's group at the scene did not recognize Edwards.

[4] According to the statements from one of Gordian's friends to police, Edwards yelled, "Go blast that nigga," and McGhee again aimed at Gordian and yelled, "Shit. I missed my shot." At trial, the friend denied ever making those statements.

like, low-key in the background. Like, he's with it, like he's down to do it, but he'll always be the one in the background."

On Sunday, October 30, 2011, McGhee, Edwards, and Higgs "were trying to hit another lick."

4. October 31, 2011 Robbery and Shooting

On Monday, October 31, 2011, appellants left the Hudson house together around noon. McGhee wore a white sweatshirt. Higgs wore a white shirt with a large black logo. And Edwards wore "something red," either a shirt or hat.

That afternoon, victim Sandoval was walking near a strip mall in Canyon Country when victim Alejandro Sanchez-Torrez asked him for a dollar. Sandoval gave him the 35 cents he had on him. Sandoval lived in a nearby apartment complex with a dry river bed, or "wash," separating the complex from the strip mall.

As Sandoval sat on a wall reading, a teenage African-American male wearing a white shirt approached him.[5] As the male passed Sandoval, Sandoval asked if he would be interested in purchasing a Nintendo video game device. The white-shirted male said he had a friend who might be interested and he would be back.

Several minutes later, the white-shirted male returned with two other African-American males, one in a red shirt and one in a black shirt. Sandoval did not have the Nintendo game device with him and asked $30 for it. The red-shirted male said he would give him $60. The white-shirted male said something like, "He's high" and "Don't listen to him." Sandoval asked if they

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[5] Because Sandoval's "primary memory" of the perpetrators was the colors of their shirts, we will refer to them in that manner for the discussion that follows.

had any "weed." The white-shirted male said he had a pound of marijuana. Sandoval asked for $10 worth. One of the males asked Sandoval for a lighter, so Sandoval gave him a green BIC lighter, and the males started smoking. At some point they asked if Sandoval had any money, and he said no.

Sandoval went to his apartment and got the Nintendo game device, a $20 bill, another lighter, and a marijuana pipe. When he returned, he handed the device to the males, who passed it around. They did not give it back to him. He overheard one of them whisper, "Let's do it fast." The white-shirted male then pulled out a small, grayish .22-caliber automatic gun, pointed it at Sandoval's face, and told him to put his hands up. He complied, although he thought the gun might be fake.

The white-shirted male ordered him down into the wash, and the three males followed. Sandoval stood against a wall with his hands up. At some point, he removed his wallet and held it in his hand. The white-shirted male told Sandoval to give them everything he had, and Sandoval started emptying his pockets. The white-shirted male told the others, "Go search this nigger." Sandoval responded that he did not have anything else. He handed his wallet over, and the black-shirted and red-shirted males searched him, but he was not sure if they took anything else.

As the two others walked away, the white-shirted male lowered the gun to Sandoval's chest, and Sandoval heard three clicks from the gun. The others returned, and one of them said, "Let's get this nigger." The red-shirted male said, "No man, you know, let him—." As the white-shirted male tried to fix the gun, Sandoval threw a rock. The others began throwing rocks, and Sandoval threw more rocks back. The white-shirted male

said, "Let's go." The three males ran across the wash to the strip mall, and Sandoval chased them. The white-shirted male turned and pointed the gun at Sandoval and pulled the trigger several times. Sandoval zig-zagged to avoid any bullets, but the gun did not fire. At the top of the wash, the white-shirted male stopped, turned, and pointed the gun at Sandoval again. The three males were talking to each other and the white-shirted male was still trying to unjam the gun and shoot at Sandoval, who zig-zagged again.

The three males ran to a blacktop area. Two of them looked through Sandoval's wallet and one of them threw it on the ground. Sandoval continued to chase them, mostly because he was angry and wanted them caught. The three males stopped and faced Sandoval, cursing at him and calling him over. Sandoval fought them, and they all hit him. He fell to the ground and was kicked and hit in the head with what he thought was the gun. He fought back and called out for help. At some point, he was able to retrieve his wallet and the Nintendo game device.

Sanchez-Torrez, whom Sandoval had encountered earlier, was nearby with his seven-year-old son Anthony Sanchez. Anthony saw the males beating up Sandoval, and Sanchez-Torrez said, "We're gonna go help him." He ran toward the group carrying Anthony's aluminum T-ball bat.

The white-shirted male pointed the gun at Sandoval again and pulled the trigger; the gun still did not fire. He then pointed it at Sanchez-Torrez and pulled the trigger. This time it did fire, shooting Sanchez-Torrez in the chest. He fell face-down. The white-shirted male turned the gun on Sandoval and shot him in the leg. The three males fled in the same direction. Sandoval later identified them, although he was unclear about which color

shirts they were wearing. He thought McGhee wore a black shirt, and Edwards and Higgs wore white shirts. Sanchez-Torrez died from the gunshot wound.

5. Post-murder Facts

Around 3:20 p.m. on the day of the shooting, Los Angeles County sheriff's deputies responded to a dispatch call and detained Edwards and Higgs in a condominium complex near the crime scene. That evening, detectives interviewed Edwards, who told them he went to the wash wearing a red shirt and removed a cell phone from a Mexican male's pants pocket without his consent. He tossed the phone back because it was "weird." Shortly thereafter, he changed out of his red shirt at a nearby apartment complex. Detectives also interviewed Higgs, who told them he had gone to the wash wearing a black shirt and removed a marijuana pipe from a Mexican male's pants pocket without consent. He dropped the pipe. He also changed his shirt at a nearby apartment complex.

McGhee escaped immediate capture. Sweaty and out of breath, he ran to the home of his friend Joseph Perez-Coronel. According to Perez-Coronel's interview with police, McGhee displayed a "chrome-ish" "Deuce 5" gun and asked if Perez-Coronel wanted to buy it. Perez-Coronel heard a helicopter and "put the two and two together," asking McGhee, "[A]re they here for you?" McGhee replied, "[M]aybe." Perez-Coronel asked McGhee to leave.

Later that evening, McGhee went to the home of another friend, Aaron Grandchamp, saying he needed a place to stay for the night. He said he had been with Higgs and Edwards and had shot somebody at the wash. He also said his mother had a plane ticket for him to go to Detroit. Grandchamp let him stay

overnight. The next morning, he showed Granchamp a small black gun, saying he needed to "stash" it.

That morning, McGhee and Grandchamp went to Michelle Hudson's house. Michelle confronted McGhee, telling him Edwards and Higgs were in custody. He "dropped his head" and looked at the ground. She told him if he had any involvement in the murder he needed to turn himself in. He responded, "[T]his is not like camp. This is bigger than camp." At some point, Robinson referred to a news article and asked McGhee, "[I]t says somebody got killed. What happened?" McGhee responded, "Yeah, bro, I shot him." McGhee left.

A detective spotted McGhee that afternoon walking about half a mile from the Hudson home. When the detective attempted to detain him, he ran, although he eventually stopped.

At the scene of the shooting, officers found two .25-caliber shell casings, the game device, and Sandoval's wallet. At the condominium complex where Edwards and Higgs were arrested, officers found Sandoval's green lighter, a red T-shirt in an area where Edwards had run, and two backpacks, one of which contained clothing and personal hygiene items. Michelle gave police a .25-caliber shell casing she found in her backyard prior to the October 31, 2011 shooting. Testing revealed it came from the same gun as the casings found at the shooting scene. Edwards and Higgs tested positive for gunshot residue.

In a recorded jail call, McGhee told his girlfriend to convey a message that Grandchamp should not testify against him.

6. Defense Case

McGhee and Edwards did not present affirmative evidence in their defense. Higgs called the sheriff's deputy who had interviewed Sandoval at the hospital after the shooting.

Sandoval told her that, after McGhee tried to shoot him the first time, Edwards and Higgs told him, "Let's just go." Sandoval also told her McGhee asked him if he ever stole from anyone. Sandoval said no, and McGhee responded, "Well, we do[,] a lot."

DISCUSSION

1. Edwards's Appeal

a. Felony-murder jury instructions

Edwards and Higgs were tried for the murder of Sanchez-Torrez only on a theory of felony murder. As to them, the court instructed the jury for felony murder based on CALCRIM No. 540B, which stated in relevant part:

"All three defendants are charged in Count One with murder, under a theory of felony murder.

"A defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

"To prove that a non-perpetrator defendant is guilty of first degree murder under this theory, the People must prove that:

"1. The non-perpetrator defendant committed, or attempted to commit ROBBERY; or aided and abetted in a ROBBERY; or was a member of a conspiracy to commit ROBBERY;

"2. The non-perpetrator defendant intended to commit, intended to aid and abet the perpetrator in committing, or intended that one or more of the members of the conspiracy commit ROBBERY;

"3. If the defendant did not personally commit or attempt to commit ROBBERY, then a perpetrator, whom the defendant was aiding and abetting, or with whom the defendant

conspired, personally committed or attempted to commit ROBBERY; AND

"4. While committing or attempting to commit ROBBERY, the perpetrator caused the death of another person."

The instruction further stated, "It is not required that the person die immediately, as long as the act causing death occurred while the defendant was committing the ROBBERY."

The court also instructed the jury based on CALJIC No. 8.21.1:

"For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time. [¶] A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property. [¶] A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an[] escape with the property."

Edwards argues the instructions were incomplete because they did not expressly require the jury to find a "logical nexus" between the robbery and Sanchez-Torrez's death. That requirement, he argues, was found in former CALCRIM No. 549, which was eliminated in 2013 prior to the trial in this case, and the trial court had a sua sponte duty to give that instruction.[6]

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[6] That instruction would have essentially instructed the jury as follows: " 'In order for the People to prove that defendant is

(See Judicial Council of Cal., Crim. Jury Instr. (2016) Introduction to Felony-Murder Series, p. 261.) Alternatively, he argues if the court was not required to give this instruction sua sponte, his counsel was ineffective for failing to request it. We reject his contentions.

In *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*), our high court explained the scope and requirements for the felony-murder rule as applied to accomplices. "[T]he felony-murder rule does not apply to nonkillers where the act resulting in death is

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guilty of murder under a theory of felony murder, the People must prove that the [robbery] and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time in more than one location. In deciding whether the act causing the death and the felony were part of one continuous transaction, you may consider the following factors: [¶] 1. Whether the felony and the fatal act occurred at the same place. [¶] 2. The time period, if any, between the felony and the fatal act. [¶] 3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony. [¶] 4. Whether the fatal act occurred after the felony but while the perpetrator continued to exercise control over the person who was the target of the felony. [¶] 5. Whether the fatal act occurred while the perpetrator was fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime. [¶] 6. Whether the felony was the direct cause of death. [¶] And [¶] 7. Whether the death was a natural and probable consequence of the felony. [¶] It is not required that the People prove any of these factors or any particular combination of these factors. The factors are give[n to] assist you in deciding whether the fatal act and the felony were part of one continuous transaction.' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 349 (*Wilkins*) [quoting instruction given in case based on CALCRIM No. 549].)

completely unrelated to the underlying felony other than occurring at the same time and place." (*Id.* at p. 196.) Instead, "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Id.* at p. 193.)

Later, in *Wilkins, supra*, 56 Cal.4th 333, the court clarified the temporal aspect of felony murder, holding that giving former CALCRIM No. 549 without also instructing on the escape rule—at least in the context of a direct perpetrator—rendered the instructions incomplete and misleading. (*Wilkins,* at p. 349.) It found the trial court erred in refusing to give an instruction on the escape rule based on a Judicial Council bench note that interpreted *Cavitt* to preclude the application of the escape rule to explain the required temporal connection for felony murder. (*Wilkins,* at pp. 341-342.) *Cavitt*, it explained, involved the "complicity aspect" of felony murder, and in cases involving a single perpetrator, "we have never suggested that if the perpetrator flees the scene of the crime and reaches a place of temporary safety before the killing, the killing and the felony could still be considered part of one continuous transaction." (*Wilkins,* at p. 344.)

To avoid potential confusion after *Wilkins*, the Judicial Council deleted former CALCRIM No. 549 and replaced it with appropriate bench notes. (See Judicial Council of Cal., Crim. Jury Instr., *supra*, Introduction to Felony-Murder Series, p. 261.)

It provided separate instructions for direct perpetrators (CALCRIM No. 540A), nonkiller coparticipants (CALCRIM No. 540B), and unusual circumstances in which other acts caused the death (CALCRIM No. 540C).

Edwards devotes a significant portion of his briefs on appeal taking issue with the Judicial Council's deletion of former CALCRIM No. 549 and its interpretation of *Wilkins* and *Cavitt*. The simple flaw in his argument is that he does not dispute the temporal aspect of the felony-murder rule in this case, acknowledging "[t]he death of Sanchez-Torres [*sic*] occurred during a robbery, 'while' McGhee was robbing Sandoval." Instead, he challenges the adequacy of the instructions for the logical nexus requirement. Yet, former CALCRIM No. 549 relates to the *temporal* aspect of felony murder and was "designed to be used '[i]f the evidence raises an issue of whether the felony and the homicide were part of one continuous transaction.' " (*Wilkins, supra,* 56 Cal.4th at p. 348.) Because Edwards does not dispute that the robbery and murder were part of one continuous transaction, the Judicial Council's decision to delete former CALCRIM No. 549 is inconsequential.

As to the logical nexus aspect, the instructions here adequately conveyed that requirement without former CALCRIM No. 549, and the trial court did not have the duty to give any clarifying instructions absent a request from Edwards. Pursuant to CALCRIM No. 540B, the jury was told Edwards could only be liable if McGhee caused Sanchez-Torrez's death "[w]hile" committing or attempting to commit robbery. Then, CALJIC No. 8.21.1 defined when "an unlawful killing has occurred during the commission or attempted commission of a robbery." The court in *Cavitt* approved a similar instruction telling the jury the

nonkillers could be found guilty if " 'the killing occurred *during* the commission or attempted commission of robbery or burglary' by 'one of several persons *engaged in the commission*' of those crimes." (*Cavitt, supra*, 33 Cal.4th at p. 203.) As in *Cavitt*, CALCRIM No. 540B and CALJIC No. 8.21.1 together adequately instructed the jury on the logical nexus requirement.

Nor was there any colorable dispute over the facts showing a logical nexus between the robbery of Sandoval and the murder of Sanchez-Torrez compelling sua sponte clarification. (*Cavitt, supra*, 33 Cal.4th at p. 204 ["[T]here is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction."].) The robbery and murder were not "completely unrelated";[7] on the contrary, they were closely tied. Defendants robbed Sandoval at gunpoint, then fled. Sandoval immediately chased them across the wash to a nearby parking lot and got into a physical altercation with them in an attempt to stop their flight. Sanchez-Torrez approached with a T-ball bat to help Sandoval, and McGhee turned the gun on him and shot him dead to prevent him from interfering.

The court in *Cavitt* noted "cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide 'are few indeed.' " (*Cavitt, supra*, 33 Cal.4th at p. 204,

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[7] Edwards argues the "completely unrelated" language from *Cavitt* is dicta. Yet, the court stated this was part of its holding on the logical nexus requirement. (*Cavitt, supra*, 33 Cal.4th at p. 196 ["We *hold* . . . that the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place." (Italics added.)].)

fn. 5.) In *Cavitt*, a logical nexus existed when the murder victim was the target of the burglary-robbery; she was covered in a sheet, beaten, hog-tied, and left facedown on a bed, where she died of asphyxiation. Although the defendants argued their accomplice—the stepdaughter of the victim—committed the murder for personal reasons unrelated to the burglary-robbery once they were gone from the house, "one could not say that the homicide was completely unrelated, other than the mere coincidence of time and place, to the burglary-robbery." (*Id.* at p. 204.) Although Sanchez-Torrez was not the target of the robbery like the victim in *Cavitt*, his murder was directly linked to the robbery of Sandoval and its immediate continuing aftermath. As in *Cavitt*, the trial court had no sua sponte obligation to give any clarifying instructions on the logical nexus requirement.

Even assuming the failure to give former CALCRIM No. 549—or any additional instruction on the logical nexus requirement—amounted to misinstruction on an element of felony murder, the error was harmless beyond a reasonable doubt. (*Wilkins, supra*, 56 Cal.4th at p. 349.) As we have explained, the evidence overwhelmingly showed a direct connection between the robbery of Sandoval and the murder of Sanchez-Torrez, beginning with the robbery in the wash, proceeding with Sandoval's pursuit of the defendants to the nearby parking lot, the ensuing physical altercation among them, and McGhee's shooting of Sanchez-Torrez as he attempted to intervene. These facts also overwhelmingly satisfied at least five of the factors listed in former CALCRIM No. 549: the robbery and murder occurred in the same general area; the murder occurred immediately after the robbery while defendants

fled and then fought with Sandoval as he pursued them; the jury could have reasonably concluded McGhee shot Sanchez-Torrez in order to facilitate either the robbery or their escape; and the jury could have reasonably concluded Sanchez-Torrez's death was a natural and probable consequence of the robbery. The only inapplicable factor is that the felony was not the direct cause of death. Thus, " 'it appears " ' "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " ' " (*Wilkens, supra*, at p. 350.)

We also reject Edwards's claim his counsel was ineffective for failing to request former CALCRIM No. 549 or some other clarifying instruction. To establish ineffective assistance, Edwards must show both deficient performance and prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) " 'To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." ' " (*Id.* at pp. 623-624.) There could have been at least one compelling strategic reason for Edwards's counsel not to request former CALCRIM No. 549 or another clarifying instruction—in the face of overwhelming evidence of both the logical nexus and temporal connection between the robbery and murder, counsel could have sought to avoid drawing further attention to those issues to Edwards's detriment. And even if there was no tactical reason not to request additional instructions, Edwards suffered no conceivable prejudice given the overwhelming evidence demonstrating both the logical nexus and temporal connection between the robbery and murder.

b. Attempted Murder Counts

The jury was instructed with two theories to find Edwards guilty of aiding and abetting McGhee's multiple acts of attempted murder of Sandoval: (1) direct aiding and abetting, and (2) aiding and abetting based on the natural and probable consequences doctrine. Citing *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), Edwards challenges his attempted murder convictions based on the natural and probable consequences doctrine. In *Chiu*, our high court held an aider and abettor cannot be found guilty of first degree premeditated murder based on the natural and probable consequences doctrine. (*Id.* at pp. 158-159.) Two years earlier, in *People v. Favor* (2012) 54 Cal.4th 868, the court held an aider and abettor may be convicted of attempted premeditated murder if the attempted murder was reasonably foreseeable under the natural and probable consequences doctrine and the attempted murder itself was premeditated pursuant to section 664, subdivision (a). (*Favor,* at p. 880.) The court in *Chiu* did not overrule *Favor*, but instead distinguished it because it involved *attempted* premeditated murder, rather than completed premeditated murder. (*Chiu, supra*, at pp. 162-163.) Edwards argues *Chiu* should be extended to attempted premeditated murder, but he acknowledges we are bound by *Favor*, so we must reject his challenge. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Edwards also argues insufficient evidence supported either direct aiding and abetting or aiding and abetting based on the natural and probable consequences theory of attempted murder. In evaluating this claim, we must "review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Although the jury was instructed on both direct and natural and probable consequences theories of aiding and abetting, respondent does not contend any evidence supported direct aiding and abetting liability. Thus, we focus on natural and probable consequences, which exists when " ' "a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." ' " (*Chiu, supra*, 59 Cal.4th at p. 162.) Substantial evidence supported that theory in this case. Edwards does not dispute substantial evidence supported the jury's conclusion he aided and abetted the target offense—robbery. In addition, there was evidence Edwards knew McGhee would use a gun during the robbery because McGhee showed a gun in Michelle's backyard while Edwards was present and Edwards was with McGhee two days before the robbery when McGhee shot at Gordian. Although the jury acquitted Edwards of any *crimes* related to the Gordian incident, the jury could have relied on this evidence to infer Edwards could reasonably foresee McGhee would use a gun to rob Sandoval and attempt to murder him during the course of the robbery.

c. Ineffective assistance of counsel and "felony attempted murder" closing argument

Edwards claims his trial counsel was ineffective in failing to object to the prosecutor's closing argument purportedly asking the jury to apply a nonexistent "felony attempted murder" rule. We disagree the prosecutor's argument was improper, so Edwards's counsel was not ineffective for failing to object.

Edwards takes issue with the following italicized portions of the prosecutor's closing argument:

"Okay. I want to start off with one thing first out of order. If you remember one thing, remember that. Robbery is the continuing offense. Robbery is a very interesting crime. Robbery is the key to understanding everything in this case. *If you understand robbery, that you understand robbery is a continuing offense, you will understand all the charges, all the legal theories,* and all the facts make sense. Okay? [¶] Robbery is a continuing offense. That means that robbery doesn't end at the time that you forcibly take property from somebody. Or fear, you take property from someone, it doesn't end there. Robbery keeps going until the perpetrators have reached a place of temporary safety. That is the simple way of saying it. But if the victim is pursuing the robbers, the robbery is not over. Victim is trying to get his property back and trying to cause the robbers to be captured, the robbery keeps going. And whatever happens during that robbery, it keeps going. So your legal liability doesn't end at the taking." (Italics added.)

"As long as the robbery is continuing, each aider and abettor in the robbery is liable for the death caused by one of their fellow participants. The continuing nature of robbery extends the period by which an aider and abettor is on the hook for the death caused by one of their fellow participants. [¶] Why does it matter that robbery is continuing? Because I'll say this three or four different ways. *It affects aiding and abetting liability* and conspiracy liability *because it extends the period of time the robbery takes*. Not only is each defendant liable for what he does, but *he's also liable for what the others do during the entire continuing robbery. That's under the following theory:*

aiding and abetting, what his fellow principals do that are natural and probable consequences. Okay? And conspiracy liability. *What his fellow conspirators do that are natural and probable.* [¶] Under aiding and abetting liability and conspiracy liability, *each defendant is responsible for all natural and probable acts committed by the other defendants while the robbery is being committed while it continues and continues and continues.* Okay. So as long as the robbery is continuing, you are on the hook for felony murder. Done." (Italics added.)

"The robbery is still going. Robbery is a continuing offense. During this robbery, McGhee now is pointing the gun. He's pulling the trigger. The gun is not firing. What is happening at this point? The gun is being pulled. Trigger is being pulled. *Who is liable for what? You have a robbery.* You have a conspiracy to commit robbery before any of these. That was complete upon one person doing an overt act. Okay? That could have been just negotiating the price of that Nintendo, whatever. Whatever it was. Conspiracy is complete. Even if you don't like the conspiracy, *they are aiding and abetting. They are actually participating in doing the robbery. All three are guilty of doing the robbery.* [¶] *Now what you have is McGhee pointing the gun at Sandoval and he's attempting to pull the trigger. That is attempted murder by McGhee with personal use of the gun. Higgs and Edwards are aiding and abetting in the robbery. And this is a natural and foreseeable consequence of the robbery.* They are now guilty of aiding and abetting and conspiracy. *They are guilty of it. Period. It's a natural and probable consequence that when you commit a robbery with a loaded gun, that loaded gun would be used.*" (Italics added.)

Edwards claims the italicized portions above were improper because the prosecutor conflated natural and probable consequences for attempted murder with the continuing nature of the robbery for felony murder. While the prosecutor perhaps could have been more precise in delineating between the applicable theories, nothing the prosecutor said was incorrect or misleading. Indeed, the court instructed the jury Edwards could be found guilty of the nontarget crime of attempted murder as a natural and probable consequence of robbery if it was committed by a coparticipant "[*d*]*uring* the commission of ROBBERY." (Italics added.) Moreover, the court instructed on natural and probable consequences for attempted murder and felony murder while committing robbery and told the jury to follow those instructions to the extent they conflicted with the prosecutor's argument. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Nothing suggests the jury failed to follow the court's instructions. Thus, Edwards's counsel was not ineffective by failing to raise a meritless objection, and even if she was, Edwards suffered no prejudice.

d. Exclusion of Edwards's statement "I'm not about to roll with ya'll"

Edwards argues the trial court abused its discretion and violated his constitutional right to present a defense when it excluded the following statement Robinson made to police about what Edwards told McGhee and Higgs on the morning of the

robbery and murder: "So then on Monday, Monday morning . . . Brandon [Higgs], Tay [McGhee], and Eric [Edwards]—Eric was the one who did not want to go. Eric was the one who did not want to go. Eric wanted to stay. I know Eric wanted to stay. Eric's like, 'bro, I'm not about to roll with ya'll. I already know what ya'll about to do, I'm not about (to) go.[']" Respondent argues the court did not exclude this statement; defense counsel simply abandoned any effort to introduce it. After reviewing the record, we agree.

Prior to trial, the prosecution moved to introduce a number of statements by defendants. Item 12 was the following statement from Robinson to police, which the prosecution argued fell within the state of mind hearsay exception to show Edwards knew McGhee's proposed conduct would get him in trouble: "Eric [Edwards] did not want to do nothing. Eric was all like, 'No, I want to stay.'" "At the door, I was like (to Eric), 'Bro, whatever, if anything happens, call me. Call me.'" Item 13 included the "roll with ya'll" statement set out above, which the prosecution argued was also admissible on a variety of grounds. Edwards filed a written opposition that specifically addressed item 12 but did not address item 13. At a hearing on the motion, Edwards's counsel submitted on item 13, and the court excluded item 12 and admitted item 13.

At trial, Edwards's counsel asked Robinson, "[D]o you recall . . . in your interview of November 1, 2011, that you told the police officer . . . Eric [Edwards] was the one who did not want to go[?]" The prosecutor objected, and the court held a sidebar as follows:

Prosecutor: "I think in my . . . motion item 12 I was trying to admit Edwards' statement to Keyada Robinson on 10-31 that

Edwards was aware of what McGhee and Higgs were going to do, and the court did not admit that."

The court: "Right."

Prosecutor: "This is that area right there. And also, it's one thing if Eric says he wants to stay, but if the witnesses say what—it's inadmissible what a witness, what somebody's intent was. If somebody says they said that to me, that's a different story. If that statement emits a particular intent, that is okay. But to say what this person did or did not want to do, what their intent was, was something I'm not allowed to do and I cut that out of the portion that I played for the jury this morning. And the 11-10 interview, in part because I felt that it would run afoul of this, of that general rule, and also because [Higgs' counsel] did not want to see this as that issue, but also as the issue that was not admitted pursuant to the court's ruling."

The court: "Right. That was the portion I did exclude at the request of the defense."

Edwards's counsel: "Well, he's not saying he's going to go hit a lick or anything like that. He just says I'm not about to roll with y'all. I don't want to go—he's the one who doesn't want to go. So then he says here, good."

The court: "I think that has to come in, to some degree, the fact he didn't want to go, but ultimately did go."

Prosecutor: "That was Higgs changing his demeanor. Higgs was the one that said, you know what, screw it. I'm gonna go. The court ruled that was admissible. The court ruled this was not. Now, maybe she can get in that statement like something Eric may have said, but the fact Eric was the one that didn't want to go, wanted to stay, I know he wanted to stay, that I think is inadmissible. . . ."

The court: "All right. So you can get in what—"

Edwards's counsel: "This is a statement. I'm not gonna roll with y'all. Now, that doesn't say I'm gonna rob. He said I don't want to leave with you. That's a statement."

The court: "That's the one portion you want to get that Eric said that he—"

Edwards's counsel: "Well, except in this context he says Eric wants to stay. He wanted to—he said I don't want to go with you. That's my translation in English."

Higgs's counsel: "I see [the prosecutor's] point here in that—"

Edwards's counsel: "I don't."

Higgs's counsel: "Well, it is a question that could be argued. He is implying I know what you guys are gonna do and I'm not gonna go do it with you. I think that's the sort of—and the reason I say argument is I believe that is what he argued. . . . I think that that's—I think that I continue to argue it is not possible that it would be improper for [the prosecutor] to argue from that statement that they were going to go, that that statement suggests they were gonna go rob somebody."

Prosecutor: "Well, this is what my initial theory was. It was the state of mind exception because he had to know what—"

The court: "Okay. My—"

Prosecutor: "—counsel for defense, and he was going to get into trouble. And the court found it is not for Higgs, so it is not admissible, and it is not admissible for defense counsel."

The court: "My ruling will stand."

Cross-examination resumed, and Edwards's counsel asked Robinson, "Do you remember saying Eric was in his pajamas that morning and didn't want to leave?" The prosecutor interjected,

"Same objection." The court asked, "As to the clothing?" The prosecutor responded, "No. As to the second part of the question." The court sustained the objection and told Edwards's counsel to rephrase the question. In response, she did not ask any questions about what Edwards had said to Robinson about not wanting to go. Later, the prosecutor played for the jury a redacted version of Robinson's interview with police, which did not include the "roll with ya'll" statement.

While not the cleanest record, we think it is at least clear that the court would have allowed Robinson to testify that Edwards made the "roll with ya'll" statement to him, undermining the factual foundation of Edwards's argument that the court excluded the statement erroneously. Before trial, the court expressly admitted the "roll with ya'll" statement as item 13 in the prosecutor's motion. Then, during the sidebar at trial, when Edwards's counsel argued he was saying he did not want to go, the court responded, "I think that has to come in, to some degree, the fact he didn't want to go, but ultimately did go." At the conclusion of the sidebar, the court stated its rulings stood, which reasonably referred to its pretrial ruling admitting the "roll with ya'll" statement. When questioning resumed, the prosecutor only objected to the question asking Robinson about Edwards's intent—whether he actually did not want to go. The court seems to have understood that when it directed Edwards's counsel to rephrase the question. Whether through a misunderstanding or a tactical decision, it appears Edwards's counsel simply chose to not ask Robinson about the statement during cross-examination. Thus, because the court never excluded the "roll with ya'll" statement, it could not have done so incorrectly, and Edwards's argument fails.

e. Challenge to sentence of 58 years to life

Edwards was 17 years old at the time he committed the crimes in this case. Because he was found guilty of first degree murder with the special circumstance of robbery, the trial court had discretion to sentence him to life without the possibility of parole (LWOP) or 25 years to life. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360-1361 (*Gutierrez*) [construing § 190.5, subd. (b) to give discretion to sentencing court to impose LWOP or 25-years-to-life for special circumstances murder committed by juveniles]; see *Miller v. Alabama* (2012) 567 U.S. 460, 465 (*Miller*) [mandatory LWOP sentence for juvenile homicide offense constituted cruel and unusual punishment].) In a sentencing memorandum, the prosecutor recommended *not* sentencing him to LWOP, given his lesser role in the crimes. Recognizing its sentencing discretion under *Miller*, the trial court declined to impose an LWOP sentence, explaining: "The court is dealing with the case where there is a special circumstance and the individual is a minor. The court has discretion in deciding whether a juvenile homicide offender should be sentenced to life without parole, but the court must conduct an analysis under *Miller versus Alabama* looking at certain factors in this matter. [¶] The court has, obviously, looked at the *Miller* case, obviously the *People versus Gutierrez* case, which is a California case. It also talks about that the sentencing court has the discretion and must consider all relevant evidence including the *Miller* factors in deciding whether to give the defendant either life without the possibility of parole or 25 [years] to life sentence. So there is no presumption in favor of an L.W.O.P. sentence for a juvenile offender." The court therefore opted to sentence Edwards to 25 years to life on the murder count plus 28 years to life for the

attempted murder counts, and an additional five years for the firearm enhancements.

Edwards argues his aggregate sentence of 58 years to life was the equivalent of a life sentence and, because he was under 18 at the time he committed the crimes at issue, it constituted cruel and unusual punishment. As determined in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), however, his claim has been rendered moot by the enactment of section 3051. That provision provides that a juvenile defendant sentenced to a term longer than 25 years to life is "eligible for a 'youth offender parole hearing' during the 25th year of his sentence." (*Franklin, supra*, at p. 277.)

In *Franklin*, the juvenile homicide defendant was sentenced to two mandatory consecutive terms of 25 years to life. He challenged his sentence pursuant to *Miller*, arguing it was the functional equivalent of a mandatory LWOP sentence barred by *Miller*. (*Franklin, supra*, 63 Cal.4th at pp. 273-274.) Our high court first held *Miller* applied to mandatory sentences that were the functional equivalent of LWOP sentences. It then concluded section 3051 rendered the defendant's challenge moot. That provision entitled the defendant to parole hearing no later than his 25th year in prison and mandated the parole board " 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law," such as *Miller*. (*Franklin, supra*, at p. 277.) As a result, the defendant was "now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither

LWOP nor its functional equivalent" (*id.* at pp. 279-280), so no *Miller* issue arose and the defendant's claim was moot.

Edwards argues *Franklin* may not apply here because his sentence involves both indeterminate and determinate components, whereas the sentence in *Franklin* involved only two indeterminate terms. Any uncertainty in that respect, however, is resolved by the language of section 3051.

Although the statute does not expressly address mixed determinate and indeterminate sentences, separate subdivisions of the statute apply to determinate and indeterminate sentences imposed for the "controlling offense." For a "controlling offense" with a determinate term, the defendant "shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions." (§ 3051, subd. (b)(1).) For a "controlling offense" with a term of 25 years to life, the defendant "shall be eligible for release on parole by the board during his or her 25th year of incarceration." (*Id.*, subd. (b)(3).) The statute defines "controlling offense" as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (*Id.*, subd. (a)(2)(B).) This definition does not distinguish between determinate and indeterminate terms, so for a mixed sentence, the court simply identifies the offense or enhancement with the longest term—whether determinate or indeterminate—as the "controlling offense" and applies the applicable subdivision.

Here, Edwards's longest term was 25 years to life for first degree murder, so that was his "controlling offense" and he would be eligible for parole no later than his 25th year. With that clarification, Edwards acknowledges we are bound by *Franklin* to

treat section 3051 as an adequate remedy for his *Miller* claim. (See *People v. Cornejo* (2016) 3 Cal.App.5th 36, 68 (*Cornejo*) [applying *Franklin* to sentence with both mandatory and discretionary components].) His challenge is therefore moot.[8]

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[8] Although not clear in his brief, Edwards seems to suggest remand might be appropriate for the court to make a record at sentencing regarding the youth factors that could be pertinent at a later parole hearing pursuant to section 3051. In *Franklin*, although the court concluded the *Miller* claim was moot, it remanded the matter to the trial court for the limited purpose of determining whether the juvenile offender in that case "was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing" because it was not clear from the record that the defendant had the chance to do so at the original sentencing. (*Franklin, supra*, 63 Cal.4th at p. 284.) If the trial court concluded the defendant did not have a sufficient opportunity, it was directed to accept submissions and testimony on the defendant's youth, with the goal of providing "an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid*.)

The *Franklin* defendant was sentenced before *Miller* was decided, and in *Cornejo*, the court declined to remand a case involving defendants who had been sentenced *after Miller* and had been given sufficient opportunity at sentencing to present the characteristics of youth contemplated by *Miller* and *Franklin*. (*Cornejo, supra*, 3 Cal.App.5th at pp. 68-69.) The same is true here. Edwards was sentenced after *Miller* and was afforded an adequate opportunity to develop the factors related to his youth

2. McGhee's Appeal

a. *Aranda/Bruton* Error

McGhee argues the trial court's admission of redacted statements by Edwards and Higgs to police violated *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*). We disagree.

Citing *Bruton* and *Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*), the prosecution moved before trial to introduce redacted statements Edwards and Higgs separately made to police, with the limitation those statements would only be introduced against those defendants respectively and no other defendant. Edwards's redacted statement stated as follows: "Mr. Edwards was interviewed at the Santa Clarita Sheriff's Station on the evening of 10/31/11. I advised him of his *Miranda*[9] rights (description of rights omitted) and he agreed to speak with me. Mr. Edwards stated that he went to the wash on 10/31/11. Mr. Edwards stated that he wore a red shirt. He

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that would later inform the Board of Parole's decision. In his sentencing memorandum, Edwards's trial counsel argued his youth and family background mitigated the crime, and she attached letters from his mother, father, siblings, and others describing his background and character. (*Cornejo, supra,* at p. 69 [record contained sentencing memoranda and letters discussing *Miller* and defendant's good character].) At the sentencing hearing, the court acknowledged reading Edwards's sentencing memorandum, recognized its discretion under *Miller*, and opted to sentence Edwards to 25 years to life rather than LWOP. Edwards does not point to anything more he would present to the court if given the opportunity, so we decline to remand the case for a further hearing.

9 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

approached a Mexican male and removed a cell phone from the Mexican male's pants pocket without the Mexican male's consent. Mr. Edwards stated that he then tossed the phone back to the Mexican male because the phone was a 'weird' 'Boost' phone. Mr. Edwards admitted that he changed out of his red shirt while at an apartment complex a short distance away a short time later." Higgs's statement said as follows: "Mr. Higgs was interviewed at the Santa Clarita Sheriff's Station at 12:11 am on November 1st. Higgs stated that his date of birth was 8/15/94. I advised him of his *Miranda* rights (description of rights omitted) and he agreed to speak with me. Mr. Higgs stated that he went to the wash on 10/31/11. Mr. Higgs stated that he wore a black shirt. Higgs admitted that, while at the wash, he removed a marijuana smoking pipe from a Mexican male's pants pocket without the Mexican male's consent. Higgs stated that he dropped the pipe onto the ground shortly thereafter. Higgs stated that he later changed his shirt at a nearby apartment complex."

At a hearing on the motion, McGhee's counsel noted he had filed a severance motion based on the statements from Higgs and Edwards and argued that such statements could not "be redacted and not inculpate" McGhee, so McGhee could not get a fair trial if they were admitted. The court disagreed and admitted the redacted statements, finding there was no reference to any other defendant or even mention of "we" or "they." The statements also did not shift blame to anyone else. For those reasons, the court also denied McGhee's motion to sever.

During opening and closing arguments, the prosecutor repeatedly told the jury it could only use the statements against the individual who made them and not against the other

defendants. Likewise, before the statements were introduced and during formal instructions, the court instructed the jury it could only use the statements against the individual who made them and no one else.

Under *Aranda* and *Bruton*, a " ' " 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' " ' " (*People v. Capistrano* (2014) 59 Cal.4th 830, 869.) The rule does "not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial." (*Ibid.*, citing *Richardson, supra*, 481 U.S. at pp. 206-207.) Thus, "admission of a nontestifying codefendant's confession against the defendant does not violate the defendant's confrontation right if the confession is redacted to eliminate not only the defendant's name but any reference to his existence. [Citation.] 'When, despite redaction, the statement obviously refers directly to the defendant, and involves inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial, the *Bruton* rule applies and introduction of the statement at a joint trial violates the defendant's rights under the confrontation clause.' " (*Capistrano, supra*, at p. 869.)

The statements admitted by the court plainly did not violate *Aranda* and *Bruton* because, as the trial court recognized, they did not refer to McGhee's existence in any way. They did not even use pronouns like "we," "us," "they," or "them" to suggest the presence of any other individual at the robbery. While the statements might have incriminated McGhee when linked to

other evidence, that does not render the statements improper under *Aranda* and *Bruton*. Further, both the prosecutor and the court told the jury repeatedly it could only use each statement against the defendant who made it and no one else. Under these circumstances, we find no error.

b. Request to excuse jurors and for mistrial

i. Procedural background

McGhee contends the trial court deprived him of an impartial jury when it refused to excuse three jurors during deliberations or declare a mistrial after one juror expressed concern someone might have been photographing them in the courthouse parking lot. We disagree.

During deliberations, the trial court advised counsel the court clerk received a call from Juror 2, who said as she was leaving the courthouse the previous day a female in a black Toyota sedan took photographs of her leaving the parking lot. The incident upset her and she spoke to Jurors 8 and 3 about it. She also had someone else drive her to court the next day.

The court separately interviewed Jurors 2, 3, and 8 about the incident. Juror 2 explained to the court:

"[A]s I was pulling out, a little bit to my right there was a black Toyota sedan, and as I was looking to my right I noticed a hand came out of the car. And to me it looked like it was a cell phone, and it looked like it was pointed right at my car. So it would be directly facing the front of my car. And I thought, did I just imagine that or am I paranoid? So I drove home.

"I looked around to see if I was being followed. No. Got to my daughter's school. And I called Juror number eight. I don't have everybody's number, just eight and the alternate. And I said, did you notice anything funny when you were driving out of

the parking lot? Yeah, there was a black car taking selfies. I said, 'Are you sure they were taking selfies, because I thought the camera was pointed to me.' And she said, 'I left after you and thought they were taking selfies.'

"So she called Juror no—sitting next to me, Juror number three. And Juror number three said, yes, she saw the phone come out of the car, and she saw it flash. And she asked her, 'Do you think it was a selfie?' And she said, 'It looked like the flash was towards me.' And also one of the other jurors, the guy, I don't know what number he is, he said that when he was pulling out [of] the parking lot, he also saw the phone come out, but he thought they were taking selfies. So they thought they were taking a lot of selfies, and we are paranoid. So somebody is taking pictures of us, my car, my license."

The court asked Juror 2 if she recognized the person, and she said, "All I know, it was a female. I didn't notice anything else. I don't know if I saw hair or how I know it was a female, but the other two jurors also said it was a female." The court informed her it would tell the other jurors it would provide escorts at lunch and asked her to follow the law and give both sides a fair trial. Juror 2 asked if there were cameras in the parking structure, and the court responded, "[E]verything will be looked into. But what I need you to do is not hold that against any party. We don't know if they were selfies. You don't know who it is associated with. It could be just someone taking photographs. You have no idea if it relates to any of the parties involved. Correct?" Juror 2 responded, "Correct." The court finished, "So what I will ask you to do is set this aside and be fair to all sides. Can you do that?" Juror 2 responded, "Correct. As long as I feel like I'm safe here." The court said, "We'll make sure

that you feel safe." Juror 2 responded, "Okay." She then agreed not to discuss the issue with other jurors.

Juror 8 told the court: "I was starting to leave. I noticed that there was a person sitting in the car. It was an all black car, and the window was down. Their arms were out the window. You couldn't see their faces. And they had like a cell phone camera, so I thought—at first I didn't think too much. I thought they are taking selfies. But usually you would see somebody's face or something. It just kind of—I didn't really think too much of it, except that it was just strange that the camera was outside of the car, like almost all the way outside the car, and I knew there was somebody else in the car with her. It was a young girl. That much I do know. Skinnier arms. Kind of olive complexion. [¶] And as I made a right-hand turn, I just thought, okay, teenager taking selfies. Didn't really think much of it. Kept going. Then I received a phone call from Juror number two. And she asked me, 'Did you notice a girl in the black car taking pictures of our cars?' And I said I didn't know if she was taking pictures of her or us, and I told her—"

The court asked, "You thought they were possibly selfies?" She responded, "I thought possibly selfies. And I thought—but that is strange she saw it too. And she left after I did, probably like four or five minutes after I did. I think I was out, you know, way before her because she was still talking to two other jurors in the parking lot when I was leaving. And so I thought, well, that's kind of a long time to wait—or a long time to be taking selfies. [¶] So then I called another juror and asked if she saw it, and she said, yes. And I said, 'Did you think they were taking selfies?' And she said, well, the only thing that was strange to her was the flash was going back or was not going back into the car, the flash

was coming out of the car." The court asked, "So at this point you don't know who it was. Correct?" Juror 8 responded, "No. Absolutely. I never saw the face. I could definitely identify it was a female. There was probably a ring or something on the finger. But just the shape of the arms, it was definitely a female." The court again inquired, "You thought they might have been doing selfies?" Juror 8 responded, "Yes," and added, "I'm not a hundred percent sure they were taking pictures of our cars."

The court asked Juror 8 to set the matter aside, and she responded she could do that and be fair to both sides. The court instructed her to follow the law, and she responded, "Absolutely." The court asked if she had any "issues," to which she responded, "I do not have a problem with that." She asked for an "[e]scort, maybe, when we leave," and the court said it may be able to arrange that. She said her husband dropped her off that morning "just to play it safe." The court asked if she attributed the incident to anyone, and she said, "Absolutely not." She then agreed not to discuss the issue with anyone.

Juror 3 told the court: "I was behind a black truck, and there was a car on my left-hand side with a female that had stuck her hand out the window with a cell phone. I only saw a flash go off. It could have been a reflection or flash, but it wasn't towards my car. I saw it towards the black truck in front of me. I thought that was kind of odd somebody is taking pictures, but I can't say it was of myself. It was probably of the car in front of me." She added, "[T]here was somebody else in the passenger seat, but he wasn't paying attention to what she was doing." She said she did not recognize the person and "couldn't tell" if they were taking a

photograph of themselves. She saw "the phone out the window with the flash that went off."

The court instructed her to disregard the incident. She said she could follow that instruction and give all sides a fair trial. She would not be affected by the incident in any respect. When asked if she had spoken to other jurors, she said, "I spoke with Juror number eight. She actually is the one that called me yesterday. She asked if I had recognized something unusual. That's the person I had the first contact with. And, yes, we were talking about it out there. I'm not going to lie and say we are not." The court asked, "Just generally among the jurors there was a possible photograph[] taken yesterday?" She responded, "Correct. That was it. We didn't debate about what it was indicating, just recognize there was a car and a female who was taking pictures." She indicated she would not discuss the issue with other jurors.

McGhee's counsel asked the court to excuse Jurors 2, 3, and 8 for cause. Edwards's and Higgs's counsel also moved for a mistrial, which McGhee's counsel later joined. The court denied the mistrial, explaining, "I spoke to Jurors two, eight and three and conducted extensive questioning of them. All of them were somewhat unclear as to what occurred. One thought possibly it was selfies. They all indicated it was somewhat suspicious. They were unable to link it to anyone involved in this case whatsoever. They all indicated that they could put it aside and be fair to all sides." The court denied the request to dismiss any jurors "in light of the fact there is no good cause shown, and in light of the responses of the jurors indicating they could be fair and follow the law."

The court admonished the full jury: "Ladies and gentlemen of the jury, it has come to my attention of an incident regarding a cell phone that occurred yesterday in the parking lot. At this point there is no evidence that it is connected with anyone involved in this case. I'm going to be ordering you to disregard anything you may have heard or saw about the incident. At this point, you are also ordered not to further discuss this matter. I'm also going to instruct you, you are not to consider this incident for any reason whatsoever, and not let it affect your deliberations in any way. [¶] Also, just as an abundance of caution, the court is going to provide escorts after lunch, or at the time of lunch, and when you leave the courtroom. So that'll be provided for you. So, again, you must not consider this incident for any reason whatsoever, and not let it affect your deliberations in any way." The court asked if anything would prevent the jurors from being fair and impartial, and no juror raised a hand.

Later, McGhee's counsel augmented the record as follows: "Description by one or more of the jurors was they saw a dark-colored car and an arm extended outside, one of the jurors said, and was using two arms to extend outside the car. And one of the jurors described that arm, olive-colored arm, and I'm sure the court has figured out Mr. Higgs had his sister in court, a young African American female, and McGhee's family has had Mr. McGhee's sister in court, a young African American female. So the concern is that any perception of something being done against a juror I think would be more against the defense than certainly the prosecution. So I wanted to augment the record with that because, absent that, anybody reviewing this record would not know those people were in the courtroom."

The prosecutor responded: "As I think we've all been able to observe, but the record would be silent on this issue, but throughout this trial there have been a number of audience members. I think that there may have been a couple that were not African American, but I believe that the rest were African American, most of whom are very dark complected. There are some of the audience members that are lighter skinned, but I couldn't classify any of them as being olive-skinned individuals. [¶] So my feeling is that nobody in the courtroom, nobody in the audience will be classified as having olive skin, and therefore will not be potential suspects in the photographing. Additionally, I believe that the jurors, when questioned, stated that they did not identify anybody, they did not identify the photographer, so to speak, as being anybody associated with this case, and I assume—I think the implication was clear that included audience members."

The court again denied the mistrial motion for the reasons previously explained on the record. The court noted Juror 2 "did appear to be upset; however, she did indicate she would be able to follow the court's orders and directions and would be able to continue to be a juror."

ii. Analysis

A criminal defendant has a constitutional right to trial by an impartial jury, so a "juror's misconduct or involuntary exposure to certain events or materials other than what is presented at trial generally raises a rebuttable presumption that the defendant was prejudiced and may establish juror bias." (*People v. Merriman* (2014) 60 Cal.4th 1, 95; see *People v. Harris* (2008) 43 Cal.4th 1269, 1303 (*Harris*) [" '[T]ampering contact or communication with a sitting juror . . . usually raises a rebuttable

"presumption" of prejudice.' "].) That presumption may be rebutted and the verdict left undisturbed "if a reviewing court concludes after considering the entire record, including the nature of the misconduct and its surrounding circumstances, that there is no substantial likelihood that the juror in question was actually biased against the defendant. [Citations.] Our inquiry in this regard is a 'mixed question of law and fact' subject to independent appellate review. [Citation.] But ' "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." ' " (*Merriman, supra*, at p. 95.) "An admonition by the trial court may also dispel the presumption of prejudice arising from any misconduct." (*People v. Tafoya* (2007) 42 Cal.4th 147, 192-193.)

It is not clear on this record whether the photographing incident recounted above related to the trial here or any of the participants, so we are hesitant to conclude there was any misconduct that might have tainted the jury. But even if it constituted misconduct raising a presumption of prejudice, that presumption was rebutted because the record demonstrates there was no substantial likelihood any juror was actually biased against McGhee. The trial court extensively questioned Jurors 2, 3, and 8 about the incident, and none of them recognized the person with the cell phone taking photographs or could even be certain she was taking photographs of them. If she was, none of the jurors attributed her conduct to either the prosecution or any of the defendants. And all of them affirmed they could set the incident aside and judge the case impartially, even if Jurors 2 and 8 expressed some desire to "play it safe" with a court escort outside the courtroom. (See *Harris, supra*, 43 Cal.4th at p. 1304 [courts may rely on statements from jurors that event would not

affect deliberations].) Further, the court admonished the entire jury not to consider the incident or let it influence deliberations in any way, and no juror expressed any reluctance in doing so. Thus, the court properly denied a mistrial and properly declined to excuse any jurors.

c. Challenge to sentence

McGhee briefly contends the trial court failed to make an adequate record under *Miller* before sentencing him to life without parole as a juvenile. We find the record here adequate to support McGhee's LWOP sentence.[10]

Miller requires a sentencing court, "in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Gutierrez, supra*, 58 Cal.4th at p. 1361.) Under *Miller,* those attributes include (1) a juvenile offender's " 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences' "; (2) "any evidence or other information in the record regarding 'the family and home environment that

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[10] McGhee's appellate counsel complains he made "repeated motions to augment the record" on appeal, but as of the filing of appellant's opening brief—January 12, 2016—he had not received the transcript of McGhee's sentencing. As respondent points out, however, it appears the record was augmented with that transcript on July 8, 2015. McGhee filed no reply brief, so we do not know why his appellate counsel was unaware the transcript had been added to the record before he filed the opening brief. In any case, we decline respondent's invitation to summarily reject McGhee's contention and will review the merits.

surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional,' " including "evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance"; (3) "any evidence or other information in the record regarding 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him' "; (4) "any evidence or other information in the record as to whether the offender 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys' "; and (5) "any evidence or other information in the record bearing on 'the possibility of rehabilitation,' " including the extent or absence of criminal history. (*Gutierrez, supra*, at pp. 1388-1389.)

Here, as the court noted at sentencing, McGhee was facing a third strike sentence because the jury found the prior conviction allegations true. The prosecutor argued for an LWOP sentence because McGhee "not only murdered somebody and permanently injured somebody else, but he got two other people involved that probably never would have been involved in something like this. And one of them was a close friend of his, and he really destroyed that person's life. He got another person he barely knew involved, and completely destroyed that person's life—[.]" McGhee interjected at that point: "They grown men." The prosecutor continued, "This defendant caused so much pain to so many people; pain that'll not go away. Anthony Sanchez

[(Sanchez-Torrez's son)] will never have a father. [Rick] Sandoval will never be the same. This defendant has behaved in such a callous fashion over a period of time. He shot at Nickolas Gordian under a bridge. He conducted himself with such a wanton and reckless disregard for human life. He's a danger. And throughout this process I've not seen one wit [*sic*] of remorse from him. Not any."

McGhee's counsel responded, "[T]his is a young man who was 17 at the time. 17. And I don't know if counsel remembers his youth. I have a clear recollection of mine. It's just a matter of luck that I didn't get in a lot of trouble when I was 17. 17-year-olds are not adults. They do things impulsively. They don't think things out. Their mind is not fully developed. They are going through a lot of emotional changes in their body, and they act out differently. [¶] Teenagers are treated differently because they are not adults. They're not—and to say that a 17-year-old should be held when he is kept in prison at the expense of the state until he is my age or older is a crime in itself, in my opinion. In fact, the case law—there is a decision now that says minors should not get life without possibility of parole because we've had cases where the person had life without the possibility of parole, comes back to court and the sentence has been reduced because the sentence must not be life without the possibility of parole. It is cruel and unusual punishment. It is punishment for a crime for actions of a child. [¶] To say that—I don't know whether [the prosecutor] had any private conversations with my client. To make the determination that he doesn't have any feelings of remorse for his actions is a statement without any basis. Once again, we can do something. We're here to act in a mature way,

and mature adults should not treat a child like an adult and give them life without the possibility of parole."

The prosecutor pointed out McGhee had just called Edwards and Higgs "grown men," when they were the same age as he was when they committed the crimes. So McGhee "is saying that for all intents and purposes everybody was functioning as grown men and they were acting with the full cognizance of what was going on. This defendant knew what he was doing and he needs to be locked up forever."

In sentencing McGhee, the court expressly recognized the requirements of *Miller*: "Looking at the cases regarding determining whether the defendant will get an L.W.O.P. sentence or life, when a court elects to sentence a juvenile offender to life without parole for homicide offense, the court must weigh the applicable factors set forth in the [*sic*] *Miller v. Alabama*. And the [*sic*] *Miller v. Alabama* holds that a mandatory life of imprisonment without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment prohibition on cruel and unusual punishment."

The court continued, "*Miller* does not bar punishment of L.W.O.P. for minors, but it does determine that the sentencing court must consider various factors set forth in the *Miller* decision, and in this matter the court has considered the *Miller* factors in reaching his conclusion. In this case, the facts of the case—and, again, I'm not going to go through each one of the *Miller* factors, but I have reviewed them and considered them in my sentencing. [¶] The various facts of the actual incident, just for the record, is that the defendant arrives with a weapon. He goes to rob an individual with an accomplice. Fires the weapon multiple times at a robbery victim. When a good Samaritan

comes to the robbery victim's aid, that good Samaritan is shot. The good Samaritan falls and dies right in front of his young son who sees his father die in front of him. The defendant then again turns the gun on the robbery victim and fires a weapon. [¶] But for the fact that gun misfired, this would be a double murder. The defendant has showed a conscious disregard for human life, and I do believe that this is one of those rare occasions where the factors set forth and the type of the crime reflects [an] irreparable degree of corruption and harm, and it's just an egregious crime. So I do believe an L.W.O.P. sentence is appropriate, given the *Miller* factors. I have considered them."

This record satisfies *Miller*. Although the court did not expressly discuss all the *Miller* factors, McGhee's counsel argued that his immaturity and impulsivity counseled against an LWOP sentence. The court considered and rejected that argument, finding the egregiousness of the crime demonstrated an irreparable degree of corruption that justified treating McGhee as an adult subject to an LWOP sentence. Having recognized its discretion under *Miller*, the court acted well within that discretion in finding McGhee's actions in convincing two accomplices to commit a robbery that led to McGhee's cold, callous murder of an innocent bystander attempting to help the robbery victim was one of those "rare occasions" justifying an LWOP sentence.

DISPOSITION

The judgments are affirmed. On remand, defendant Edwards may renew his petition for resentencing before the sentencing court.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.